

Message

From: Ray, James [ray.james@epa.gov]
Sent: 7/15/2020 8:15:50 PM
To: Byrne, Andrew [Byrne.Andrew@epa.gov]; Soscia, Mary Lou [Soscia.Marylou@epa.gov]; Buffo, Corey [Buffo.Corey@epa.gov]; Anderson, Danielle [Anderson.Danielle@epa.gov]; Leutner, Fred [Leutner.Fred@epa.gov]
Subject: RE: Tribal WQS Workgroup Call Agenda - July

Hi Andy,

Okay, I'll be sure to include this topic as an agenda item we can consider for next month's call.

-James

From: Byrne, Andrew <Byrne.Andrew@epa.gov>
Sent: Wednesday, July 15, 2020 3:45 PM
To: Ray, James <ray.james@epa.gov>; Soscia, Mary Lou <Soscia.Marylou@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Leutner, Fred <Leutner.Fred@epa.gov>
Subject: RE: Tribal WQS Workgroup Call Agenda - July

Hi James –

I actually didn't check in with OGC after this, it slipped my mind. Let's at least postpone to the August call.

Mary Lou pointed out that several of the questions I posed in my earlier email are actually answered by the longer synopsis included below by John Shurts. So there may be no need to check-in with OGC but a simple sharing of the case and summary.

Andy Byrne

American Indian Environmental Office
Office of International and Tribal Affairs
U.S. Environmental Protection Agency
(202) 564-3836 (desk)
(202) 322-8607 (mobile)

Creating Tangible Environmental Results with Tribes
Find out more at www.epa.gov/tribal

From: Ray, James <ray.james@epa.gov>
Sent: Tuesday, July 14, 2020 12:22 PM
To: Byrne, Andrew <Byrne.Andrew@epa.gov>; Soscia, Mary Lou <Soscia.Marylou@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Leutner, Fred <Leutner.Fred@epa.gov>
Subject: Tribal WQS Workgroup Call Agenda - July

Hi All,

Andy, did OGC get back to you with any additional information on this topic, and does it sound like this might be a good topic to cover on a future call? At this point we have plenty of things to cover on the upcoming July 21 call (listed below), so if this case is something we'd like to cover, it may be best to discuss during our August call.

July 21 agenda topics:

- McGirt vs. OK SCOTUS decision (Tod Siegal and Tina Alvarado)
- R9 input on posting TAS DDs (Jason Brush and Danielle Angeles)
- Tribes without WQS (Danielle Anderson)
- Regional Round Robin (All Regions)

Take care,
James

From: Byrne, Andrew <Byrne.Andrew@epa.gov>

Sent: Friday, June 26, 2020 4:30 PM

To: Soscia, Mary Lou <Soscia.Marylou@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Leutner, Fred <Leutner.Fred@epa.gov>; Ray, James <ray.james@epa.gov>

Subject: RE: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority - Supreme Court declines case

Interesting Mary Lou, thanks for sharing. I'd be interested in looking into this or asking OGC. I'm confused by a few things in this summary – at first it looks like a decision consistent with the Southern California Agua Caliente Band's decision about Winters Doctrine. But then it also mentions treaty rights to fish, and then seems to say that the tribe harvests an ESA-protected fish? I'd think that a subsequent law (ESA) which indirectly affects a treaty right would trump the Tribe's right to harvest an endangered fish. Is the tribe working to restore the fish, not harvest them?

Will check in with some OGC folk next week, have a nice weekend.

Andy Byrne

American Indian Environmental Office
Office of International and Tribal Affairs
U.S. Environmental Protection Agency
(202) 564-3836 (desk)
(202) 322-8607 (mobile)

Creating Tangible Environmental Results with Tribes
Find out more at www.epa.gov/tribal

From: Soscia, Mary Lou <Soscia.Marylou@epa.gov>

Sent: Friday, June 26, 2020 2:11 PM

To: Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Leutner, Fred <Leutner.Fred@epa.gov>; Ray, James <ray.james@epa.gov>; Byrne, Andrew <Byrne.Andrew@epa.gov>

Subject: FW: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority - Supreme Court declines case

A great decision upholding the Winters Doctrine.....worth sharing on our Tribal WQS call?

Mary Lou Soscia | Columbia River Coordinator | US EPA
805 S.W. Broadway, Suite 500 | Portland, OR 97205
503.326.5873
www.epa.gov/columbiariver

From: Murphy, Stacy <Murphy.Stacy@epa.gov>

Sent: Friday, June 26, 2020 10:46 AM

To: Soscia, Mary Lou <Soscia.Marylou@epa.gov>

Subject: RE: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority - Supreme Court declines case

Thanks Mary Lou....I shared with my regional counterparts and folks in AIEO as an FYI. Happy Friday!

From: Soscia, Mary Lou <Soscia.Marylou@epa.gov>

Sent: Friday, June 26, 2020 10:15 AM

To: Palmer, John <Palmer.John@epa.gov>; Byrne, Jennifer <Byrne.Jennifer@epa.gov>; Brown, Leah <Brown.Leah@epa.gov>; Brown, Dan <Brown.Dan@epa.gov>; Gruen, David E. <gruen.david@epa.gov>; Mann, Laurie <mann.laurie@epa.gov>; Carre, Kristine <Carre.Kristine@epa.gov>; Murphy, Stacy <Murphy.Stacy@epa.gov>; Baca, Andrew <Baca.Andrew@epa.gov>; Opalski, Dan <Opalski.Dan@epa.gov>; Grandinetti, Cami <Grandinetti.Cami@epa.gov>; Wilson, Wenona <Wilson.Wenona@epa.gov>

Subject: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority - Supreme Court declines case

Here is some good news.

From: John Shurts <jshurts@nwcouncil.org>

Sent: Wednesday, June 24, 2020 2:44 PM

Subject: FW: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority - Supreme Court declines case

Some of you may remember that in November of last year the Federal Circuit Court of Appeals ruled that a decision under ESA to cease deliveries of water to irrigation contractors at the Klamath Project in order to protect listed ESA fish did not "take" the irrigators' water rights, on the grounds that the federal action under ESA was also an action consistent with the Klamath Tribes' priority reserved fishing/water rights. Summary of that opinion is in the message this note is attached to.

Two days the Supreme Court declined to review the Fed Circuit opinion, after being asked to by the irrigation contractors. This one is over – 18 years after first filed. Important opinion you may see raised in other circumstances and litigation in the future.

High Court Turns Away Challenge To Tribes' Water Rights Win

By Emma Whitford

Law360 (June 22, 2020, 12:43 PM EDT) -- The U.S. Supreme Court on Monday declined to review a Federal Circuit ruling that found tribes have priority over farmers for access to water from a resource management project developed by the federal government more than a century ago.

The high court rejected a certiorari petition from a coalition of southern Oregon and Northern California farmers, who in March argued the appeals court should have deferred to

state law in the matter. The farmers claimed their water rights had been taken without just compensation.

The U.S. government holds fishing rights for three tribes in the Klamath Basin, court records show — the Klamath Tribes, Yurok Tribe and Hoopa Valley Tribe.

The so-called Klamath Project was developed in the 1900s to provide irrigation water for local agriculture across 2,000 acres near the border of Oregon and California, according to the U.S. Bureau of Reclamation website.

In November, the Federal Circuit found the government acted in accordance with tribes' right to fish when it halted water from going to farmers in 2001. The move kept water levels high to protect fish listed under the Endangered Species Act, the circuit said.

The farmers have since argued local tribes were only entitled to catch enough fish to "support a 'reasonable livelihood,'" and that this didn't necessitate all the protections provided by the ESA.

The Pacific Coast Federation of Fishermen's Associations and the government countered in a brief to the Supreme Court last month that the circuit ruling was in line with years of legal precedent.

Specifically, the trade group referenced the 1908 Supreme Court decision in Winters v. United States

<image001.png>

, which ruled that water rights held to create a reservation apply to groundwater and preempt state water rights.

The Bureau of Reclamation did not immediately respond to requests for comment. The U.S. Department of Justice declined to comment.

Paul Simmons of Somach Simmons & Dunn, counsel for the farmers, said the Supreme Court's decision was "a disappointment."

"We, and the many amici who joined the request that the court accept review, believe that the lower court ruling did a great disservice to Western water law," he added. "Going forward, we will focus on having sufficient water for family farms and ranches rather than on compensation for water being taken."

Don Gentry is chairman of the Klamath Tribes of south central Oregon, in the headwaters of the Klamath River. The tribes rely on fishing local ESA-protected species including the shortnose snucker, he said.

"The courts have recognized despite repeated challenges that we have the highest priority

to water," Gentry told Law360 on Monday. They "affirmed we have a right to keep that water to provide for our treaty species."

Attorney Stefanie Tsosie of [Earthjustice](#) celebrated the high court's move in a statement.

"This decision affirms sound and settled principles of tribal reserved water rights," Tsosie said. "Earthjustice has long worked to protect and restore the Klamath River and its salmon, which hold significant cultural value for tribes in the Klamath Basin and are essential to sustaining the West Coast commercial salmon fishing industry."

The farmers are represented by Paul S. Simmons and Richard Deitchman of Somach Simmons & Dunn and Timothy S. Bishop of [Mayer Brown LLP](#).

h

The government is represented by Solicitor General Noel J. Francisco.

The Pacific Coast Federation of Fishermen's Associations is represented by Todd D. True and Stefanie Tsosie of Earthjustice.

The case is *Lonny E. Baley et al. v. U.S. et al.*, case number [19-1134](#), in the U.S. Supreme Court.

--Additional reporting by Morgan Conley, Mike LaSusa and Michael Phillis. Editing by Marygrace Murphy.

Update: This story has been updated with comment from the chairman of the Klamath Tribes.

For a reprint of this article, please contact reprints@law360.com.

From: John Shurts

Sent: Friday, November 15, 2019 4:35 PM

To: Council Members <CouncilMembers@NWCouncil.org>; Fish-Division Plus <FishDivisionPlus@NWCouncil.org>; Fish-State Staff <FishStateStaff@NWCouncil.org>; Sandra Hirotsu <shirotsu@NWCouncil.org>

Subject: Reclamation decision to cease water deliveries at Klamath Project not a taking of property, Fed. Circ. Says - tribes' rights are a priority

The Federal Circuit Court of Appeals just released a fascinating opinion at the intersection of Reclamation irrigation projects, state water law, ESA, Indian reserved fish and water rights, and constitutional law – in a case arising out of the Klamath River events in the low water year of 2001. To summarize the holding: The Bureau of Reclamation's decision under the ESA to cease deliveries of water to irrigation contractors at the Klamath Project in 2001 in order to preserve lake levels and river flows for the benefit of listed salmon and suckers did not constitute an unconstitutional taking of the state-law property rights of those water contractors. And that is because Reclamation's action under ESA to maintain these protective water levels was also consistent with priority Tribal reserved fishing rights in the Klamath River, given that these reserved fishing rights also work to preserve water conditions necessary to support fishing, reserved rights that have priority in time and supremacy over the state property rights. The decision is attached for those who'd like to read it.

Details:

The facts can be reduced to a fairly simple set: The Bureau of Reclamation owns and manages the Klamath Project, storing and delivering water to irrigation farmers via contracts since the early 1900s. The Klamath River and its tributaries are also the home of ESA-listed coho (anadromous) and suckers (resident). And, the Klamath Tribes have treaty fishing rights in the upper Klamath, while the Yurok and Hoopa Valley Tribes resident in California in the lower part of the Klamath system have somewhat less defined but also just as real fishing rights based in historical circumstances and Executive Orders in the 1850s-1890s.

If you will all painfully remember, 2001 was a really low water year all along the Pacific, in the Klamath as well as the Columbia. Reclamation consulted with NOAA and FWS under ESA Section 7 on the impact of proposed Klamath Project operations in that year on the listed fish species. The conclusion from both resource agencies was that ordinary project operations – i.e., the usual annual deliveries of irrigation water from the river under contract – would reduce river flows in such a low water year to such an extent as to jeopardize the continued existence of the listed species. The reasonable and prudent alternatives in the respective BiOps recommended that to avoid jeopardy, the Bureau not divert water and deliver it to irrigators if lake elevations and river flows were anticipated to go below certain minimums set forth in the BiOps and in order to insure specified minimum flow releases from the lowest dam on the system. Reclamation issued a revised operation plan for 2001 consistent with the reasonable and prudent alternatives in the BiOps, and as result ceased water deliveries to irrigators from the Klamath Project from April through July 2001.

Irrigation districts/individual landowners who have rights to water from the project sued for an injunction to require Reclamation to continue to make water deliveries under the contracts. But that early piece of the litigation resulted in a legal determination that Reclamation had the authority to modify normal project operations in order to comply with ESA requirements.

So instead, the irrigation districts/landowners filed claims for damages in the federal court of claims, arguing both breach of contract and a taking of property for which they must be compensated under the Fifth Amendment to the US Constitution. That is, legal claims that while Reclamation may have had the authority to take this action, Reclamation still had an obligation to pay damages or compensation for the adverse effects on the irrigators' contract and property rights. It has taken well more than a decade and a half to resolve these claims.

Various phases and parts of the litigation disposed of the contract claims. Ignore those.

What was left were the "takings" claims. Earlier phases of the litigation established that the irrigators likely have a recognizable property interest under Oregon state law in the portion of the state water rights held by Reclamation for the Klamath Project that represented their irrigation deliveries under the contract. If this had then turned into just a contest of ESA implementation vs. preexisting state property rights – that is, as to whether the implementation of the action under ESA by Reclamation had "taken" that early 20th century property interest, even if just temporarily - the result may very well have been an award of compensation.

Here is where it gets much more interesting: The federal claims courts also had to factor in the relevance of the Tribes' treaty and executive order reserved fishing rights, which predate the state water rights and water deliveries established under the Reclamation Act for the Klamath

Project. There is nothing specific in those fishing rights about how they might relate to water, but the Ninth Circuit had ruled in the past that the Klamath fishing rights included non-consumptive rights in the flow of the river that under certain circumstances can prevent appropriators under state law from depleting the streams below levels needed to protect fish and fishing in the river.

At the same time there is nothing particular in the Treaty or case law about what those river levels/quantities of waters are that are protected. But, NOAA and FWS, in their biological opinions, had determined that certain minimum lake levels and river flows were needed in that year to protect the fish from jeopardy under ESA, levels and flows that were at risk if water deliveries occurred. The agencies also noted that “[u]nder the current hydrology, the [Upper Klamath Lake] levels and river flows under this Plan are consistent with ... Reclamation’s obligation to protect Tribal trust resources.” That concept became the key to resolving the claims here: While the Tribes’ reserved fishing/water rights had not been quantified or made specific in any particular document or proceeding or adjudication, they didn’t have to be for the Court here to be able to conclude that a determination by the federal government under ESA as to minimum river flows critical to the survival of the fish also represented what the Tribal rights protected, that “the Tribes had rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation’s ESA obligations.” The court also concluded that while the reserved *fishing* rights might be specific to certain lands in the basin, the *water* rights appurtenant to those fishing rights extended to the river as a whole because it was the river flows across the basin that was needed to protect the fish from jeopardy.

Given these conclusions, the action by the Bureau to reduce deliveries and maintain river levels, while it necessarily compromised the state property rights, was at the same time an action consistent with and implementing the tribal reserved fishing/water rights that had priority over the state rights. Thus there could be no unconstitutional “taking” of the property rights of the irrigators if the state law rights were subordinate to the priority rights of the Tribes and both could not be implemented.

Fascinating in its own right. Also, it is not hard to think of implications of this decision for the Columbia, by itself and in combination with the “culverts” decisions in *US V Washington* that the Supreme Court deadlocked on last year. Stay tuned.

Tribes Have Priority Over Water Rights, Fed. Circ. Says

By Michael Phillis

Law360 (November 14, 2019, 9:47 PM EST) -- The Federal Circuit on Thursday ruled against a coalition of southern Oregon and Northern California farmers who argued they weren’t properly compensated when the federal government declined to release water to them, saying tribal water rights were first in line.

Upholding a lower court’s decision, the appeals panel unanimously held that the Klamath

Tribes and other tribes have priority over farmers for water rights from the Klamath Project on the Oregon and California border.

When the federal government halted water in 2001 from going to farmers so that water levels could remain high and certain fish listed under the Endangered Species Act could be protected, that was in accordance with the tribes' right to fish, the panel said.

"At a bare minimum, the tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy," the panel said.

Earthjustice attorney Todd D. True, who represents the Pacific Coast Federation of Fishermen's Associations, which argued on the side of the government, said the outcome was a victory for tribal rights.

"There was a lot of argument about whether the tribes rights really had the rights, where the rights were, what the tribes had to do to assert them, whether they had abandoned them. And the court said, 'No. These tribes hold these rights, they are based on treaties with the government, and they have to be respected,'" True told Law360.

The Klamath Tribes, Yurok Tribe and Hoopa Valley Tribe of Native Americans have rights to fish dating back to "when their reservations were created," the panel said. The Klamath Tribes, for example, have water rights that allow them to continue their "traditional hunting and fishing lifestyle."

The federal government in early 2000 analyzed the Klamath Project's water use on three protected fish, which included the shortnose sucker, the lost river sucker and Southern Oregon/Northern California Coast coho salmon. It found that diverting water for irrigation could lower levels too much and hurt the species.

The farmers argued that their water rights had been taken without just compensation and in violation of a prior agreement. They said the tribes were only entitled to catch enough to "support a 'reasonable livelihood' that didn't necessitate all the protections provided by the ESA. There were also allegations that the tribes' rights didn't extend to the Klamath Project, in addition to other arguments.

The court disagreed and said the lower court had properly affirmed the government's actions in 2017.

"This [water right] includes the right to prevent appropriators from utilizing water in a way

that depletes adjoined water sources below a level that damages the habitat of the fish they have a right to take,” the panel said.

Susan Y. Noe, a Native American Rights Fund attorney representing the Klamath Tribes, said she was thrilled with the decision.

“We think the court also did a good job of clarifying the geographical scope of the water rights, making it clear that water rights necessary to support on reservation fishing rights can come from off-reservation water sources depending on the habitat needs of the fish,” Noe told Law360.

Representatives for the federal government and the farmers did not immediately return requests for comment Thursday.

Circuit Judges Pauline Newman, Alvin Schall and Raymond Chen sat on the panel for the Federal Circuit.

The farmers were represented by Nancie G. Marzulla and Roger J. Marzulla of Marzulla Law LLC.

The Pacific Coast Federation of Fishermen's Associations is represented by Todd D. True and Stephanie K. Tsosie of Earthjustice.

The Klamath Tribes are represented by Susan Y. Noe of the Native American Rights Fund.

The federal government is represented by John Luther Smeltzer of the U.S. Department of Justice Environment and Natural Resources Division.

The case is Lonny E. Baley et al. v. U.S. et al., case numbers 2018-1323 and 2018-1325, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Juan Carlos Rodriguez. Editing by Gemma Horowitz.

Update: This story has been updated with a statement from counsel for the Klamath Tribes.